

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE COMMISSIONER OF HUMAN SERVICES

In the Matter of the Temporary Immediate
Suspension of the Family Child Care
License of Shirley Neal

FINDINGS OF FACT,
CONCLUSIONS,
AND RECOMMENDATION

This matter came on for hearing before Administrative Law Judge Barbara L. Neilson at 9:30 a.m. on November 15, 2005, at the Office of Administrative Hearings, 100 Washington Avenue South, Suite 1700, Minneapolis, Minnesota. Rebecca S. Morrisette, Assistant County Attorney, Health Services Building, 525 Portland Avenue, Suite 1210, Minneapolis, MN 55415-0972, appeared on behalf of the Hennepin County Human Services and Public Health Department ("the County") and the Department of Human Services ("the Department"). The Licensee, Shirley Neal, 423 East 33rd Street, #1, Minneapolis, MN 55408-3272, appeared on her own behalf.

NOTICE

This report is a recommendation, not a final decision. The Commissioner of Human Services will issue a final decision after reviewing the administrative record, and he may adopt, reject or modify the Administrative Law Judge's Findings of Fact, Conclusions, and Recommendations. The parties have 10 calendar days after receiving this recommended decision in which to file any exceptions to the report with the Commissioner.¹ Parties should contact the office of Kevin Goodno, Commissioner, Department of Human Services, 444 Lafayette Road, St. Paul, MN 55155, 651-296-2701 to find out how to file exceptions. Since the Commissioner must issue his final order within 10 working days from receipt of the Administrative Law Judge's recommended decision,² the parties are requested to file any exceptions as soon as possible.

Pursuant to Minn. Stat. § 14.62, subd. 1 (2004), the Commissioner is required to serve his final decision upon each party and the Administrative Law Judge by first class mail.

STATEMENT OF ISSUE

Is there reasonable cause to believe that the actions of the Licensee or of other individuals pose an imminent risk of harm to the health, safety or rights of children in the Licensee's care?

¹ Minn. Stat. § 14.61.

² Minn. Stat. § 245A.07, subd. 2a(b).

Based upon all of the proceedings herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. The Licensee was licensed by the Department to provide child care at her home at 423 East 33rd Street, #1, Minneapolis, Minnesota, on March 24, 2005. The Licensee lives in the lower level unit at that address and only the main floor of that level was licensed for day care. The upper unit was rented to the Licensee's son, who lived there with his four children. No background check was performed with respect to residents of the upper unit and no inspection was made of that space. The Licensee's hours of operation are 6:00 a.m. to 12:00 a.m.³

2. Prior to the Licensee's licensure, a County licensing worker interviewed her husband, Marion Neal. There was evidence in a closed County foster care case that Mr. Neal had tested positive for cocaine use five years previously but had successfully completed a drug treatment program. Mr. Neal denied any drug use since treatment and agreed to submit to drug testing. Subsequent urinalysis in March 2005 was negative.⁴

3. In September of 2005, a confidential informant told Minneapolis Police that a man known as "Blue" was supplying and selling crack cocaine from inside and in front of the Licensee's residence. The informant told police that "Blue" was a member of the Blood street gang and supplied drug dealers in the neighborhood surrounding the Licensee's home. The informant said that "Blue" was only allowed to come to the lower unit of 423 East 33rd Street and sell narcotics in the evening after the female owner of the house went to bed. The informant indicated that the owner's husband was a user of crack cocaine and was a friend of "Blue."⁵

4. On September 26, 2005, at approximately 10:00 p.m. and again at approximately 11:00 p.m., Minneapolis Police officers conducted surveillance of the area in front of the Licensee's home. The police reports indicate that police officers saw many suspected drug dealers, drug users, and prostitutes walking in front of and standing in front of the Licensee's home and they observed multiple vehicles pull up to the front of the address and stop. They also observed a man matching the description of "Blue" walk up to the vehicles, reach inside the vehicles momentarily, then return to the front porch of the Licensee's house. They also observed several known prostitutes and drug users stopping passing vehicles and pointing the drivers toward 423 East 33rd Street.⁶

5. Based upon the information provided by the informant, the observations made during the police surveillance, and an additional complaint received from a neighborhood resident regarding suspected drug dealing at the Licensee's address, the police obtained a search warrant on or about September 27, 2005.⁷

³ Testimony of Linda Meneely, Nancy Morris, Licensee; Exs. 1, 8, 10, 11, 17.

⁴ Testimony of L. Meneely; Ex. 11.

⁵ Ex. 3.

⁶ *Id.*

⁷ *Id.*

6. Additional police surveillance was conducted of the area in front of and around the Licensee's home at approximately 11:00 p.m. on September 27, 2005. The police reports show that the police noted heavy foot traffic around the residence. The reports indicate that Mr. Neal was observed making several trips back and forth to 5th Avenue and to the alley and was seen engaging in hand-to-hand transactions with two prostitutes in the alley in which he received currency in exchange for a small substance packaged in cellophane which the police believed to be drugs.⁸

7. At approximately 11:40 p.m. on September 27, 2005, Minneapolis police officers made a forced entry into the Licensee's residence and executed the search warrant. According to the police reports, the Licensee, Mr. Neal, Mary Smith, and Willie Henderson were present in the lower unit at the time. The reports indicate that the police found a quantity of suspected cocaine and cocaine residue, including a small plastic wrapper with suspected cocaine inside of a jacket hanging in the hall closet and a rock of suspected cocaine on Mr. Neal's person; a cigarette box containing a glass tube or crack pipe; and marijuana stems, seeds, and residue in an ashtray on a coffee table in the living room that was approximately two feet off the floor. The police reports state that Mr. Neal admitted to police that he smokes crack cocaine and has a problem. The reports further indicate that the Licensee said that she was aware of "Blue," who was a friend of her husband, and that she knew that "Blue" came around frequently but she did not like him to come around her house. According to the police reports, the Licensee also told police that "she knew that 'Blue' was a drug dealer and that he is supplying her husband's cocaine habit." A field test was later performed on the suspected crack cocaine and it tested positive. Mr. Neal was arrested. The police reports noted that numerous dead and alive cockroaches were found in the unit. The police reports further indicated that the unit was not clean; a couch was ripped along the rear and metal nails and pins were easily exposed if the cloth was pulled back; the kitchen was littered with beer cans and old food in open containers; and the refrigerator contained spoiled and outdated food.⁹

8. On the night of the raid, the Licensee was watching her four grandchildren, H.W., L.W., J.W. and D.W, ages 13, 9, 7, and 6, respectively, who were sleeping in the upstairs unit. Their father, the Licensee's son, worked at night and the Licensee typically went upstairs to check on the children multiple times at night.¹⁰ The upper level could be accessed via an inner stairwell located at the rear of the Licensee's home.¹¹

9. Ms. Smith and Mr. Henderson are Mr. Neal's aunt and uncle. They had moved to Minnesota from out of state and were temporarily staying with the Licensee and Mr. Neal. Upon arrival in Minnesota, they discovered that others with whom they planned to stay were out of town. They initially intended to stay with the Licensee and

⁸ *Id.*

⁹ Testimony of L. Meneely; Exs. 2, 3.

¹⁰ Testimony of L. Meneely, N. Morris, Licensee; Exs. 2, 12. The child maltreatment reports (Exs. 2 and 16) and some of the police reports (Ex. 3) inaccurately indicated that two children were present the night of the police raid. The maltreatment reports incorrectly identified those children as K.M. and A.A. Testimony of L. Meneely, Licensee; Ex. 12.

¹¹ Ex. 1 at 3.

her husband for only two nights, but they ended up staying three months until they obtained permanent housing.¹²

10. The Licensee never notified her County licensing worker, Patti LaPointe, that Ms. Smith and Mr. Henderson were staying in her home so that the necessary background studies could be conducted.¹³

11. Mr. Neal was charged with felony fifth degree possession of a controlled substance in violation of Minn. Stat. § 152.025, subd. 2, in connection with the September 28, 2005, raid. He has not yet been tried for the offense. On September 29, 2005, Mr. Neal was released from jail on a conditional release.¹⁴

12. On October 12, 2005, the County was notified by the Minneapolis Police Department of the September 28, 2005, raid at the Licensee's home. Child Care Licensing referred this report to the County's Child Protective Services on October 13, 2005.¹⁵

13. Linda Meneely, a Quality Assurance Specialist with the County, conducted an assessment of the level of risk posed to the children in the Licensee's care and the County. By letter dated October 13, 2004, the County recommended that the Department of Human Services place the Licensee's family child care license on Temporary Immediate Suspension.¹⁶

14. By letter dated October 14, 2005, the Department immediately suspended the Licensee's license to provide family child care effective 12:01 a.m. on Saturday, October 15, 2005. The Department noted that the suspension was based upon the report received by the County on October 13, 2005, which was being investigated by the Minneapolis Police Department and Hennepin County Social Services. The Department found that the health, safety, and rights of children in the Licensee's care were in imminent risk of harm. The letter informed the Licensee of her right to appeal the decision. The Order was served on the Licensee on October 14, 2005.¹⁷

15. On October 14, 2005, Nancy Morris, a County child protection investigator, was notified of the police raid and was assigned to investigate the Licensee's day care home. She was aware that the Licensee was about to be served with the Temporary Immediate Suspension Order. Ms. Morris reviewed the maltreatment and police reports, and conducted an investigation regarding the maltreatment report. No prior child protection complaints had been made against the Licensee.¹⁸

16. On October 17, 2005, Ms. Morris made an unannounced visit to the Licensee's home. She found K.C., the Licensee's 11-month-old great-grandchild, asleep on the couch in the Licensee's home. The Licensee told Ms. Morris that the Licensee's son in the upstairs unit was babysitting K.C. that day but had brought K.C. to

¹² Testimony of Licensee, M. Smith, W. Henderson; Ex. 16.

¹³ Testimony of L. Meneely, Licensee.

¹⁴ Testimony of L. Meneely; Exs. 1, 4, 13.

¹⁵ Exs. 1, 2, 16, 19; Testimony of L. Meneely, N. Morris.

¹⁶ Ex. 1; Testimony of L. Meneely.

¹⁷ Ex. 6; Testimony of L. Meneely.

¹⁸ Testimony of N. Morris.

the downstairs unit for a little while. When K.C. fell asleep on the Licensee's couch, the Licensee agreed to allow K.C. to continue to sleep while the Licensee's son washed dishes upstairs. The Licensee told Ms. Morris that she "knew that her husband had a drug problem but had no idea of any dealing from the home" and knew nothing about anyone smoking marijuana in her home. She indicated that she was aware that there had been a lot of people congregating outside and said that she had complained to the police and others about drug dealing and prostitution. She said that she was not aware that these activities were connected to her home. Ms. Morris' report indicates that the Licensee said that she was "pretty sure that 'Blue' has been providing drugs for her husband." The Licensee denied that Mr. Neal used drugs while in the home. The Licensee's home was clean when Ms. Morris arrived and there was no evidence the couch was ripped or the home was infested with cockroaches. The refrigerator was well-supplied and there was no evidence of spoiled food, garbage, or extreme clutter. Ms. Morris did not find that the home appeared unsafe.¹⁹

17. The Licensee's adult son who lives in the upper unit told Ms. Morris that he was aware that Mr. Neal "has been involved in drugs" but was surprised that any drugs were found in the house. He told Ms. Morris that the Licensee herself had never used drugs and had always taken care of her grandchildren and great-grandchildren. H.W., the Licensee's 13-year-old great-grandchild, told Ms. Morris that she had heard that Mr. Neal was doing drugs but she had not observed him using drugs or seen any drugs in the Licensee's unit. The Licensee's granddaughter (the mother of K.C.) said she had no knowledge of any drug activity within the home but was aware that Mr. Neal had a drug issue. The Licensee's great-granddaughter, L.M., who had three children in care with the Licensee, told Ms. Morris that she had never known of any drug activity within the home.²⁰

18. Mr. Henderson noticed signs that Mr. Neal had a drug problem while he was staying in the Licensee's home and talked to the Licensee about Mr. Neal using drugs. Mr. Henderson also knew that "Blue" was Mr. Neal's supplier. He, Ms. Smith, and the Licensee shared concerns regarding "Blue" coming in and out of the house.²¹

19. The County ultimately concluded on November 9, 2005, that the Licensee had neglected children in her care by failing to protect them from conditions or actions that seriously endangered the children's physical or mental health when reasonably able to do so. The County determined that the Licensee was providing child care for family members as a licensed day care provider when the drug raid occurred. The County also found that the Licensee was aware that Mr. Neal was using drugs and was getting drugs from a particular dealer in the area, and emphasized that other family members also knew Mr. Neal had a drug problem. The County noted that the crime with which Mr. Neal was charged is a disqualification for licensure. The County concluded that the Licensee had not taken steps to inform the County of Mr. Neal's relapse into chemical use, had failed to remove Mr. Neal from the home or contact authorities about his illegal activities, and had not notified the County of changes in household membership so that background studies could be done. The County determined that

¹⁹ Testimony of N. Morris; Ex. 12.

²⁰ Testimony of N. Morris; Exs. 12 and 14.

²¹ Testimony of W. Henderson.

children in the Licensee's care were at risk based on their exposure to Mr. Neal and the drug raid.²²

20. By letter dated November 9, 2005, the Licensee was informed of the County's determination that neglect had occurred for which she was responsible. She was told that the incident of substantiated maltreatment was found to be recurring in nature because more than one child was involved and that she was therefore deemed to be disqualified from any position allowing direct contact with or access to persons receiving services from the licensed program. She was also informed of her right to request reconsideration of the maltreatment determination and the disqualification.²³

21. At the end of the maltreatment investigation, the County's Child Care Licensing Unit completed a complaint form relating to alleged violations of Minn. Rules 9502.0435, subp. 4 and 6 (toxic and hazardous items within reach of children - drugs, drug paraphernalia), 9502.0435, subp. 1 (unsanitary conditions in the home), and 9502.0395, subp. 2A (emotional abuse - subjecting children to drug activity which was frightening to them) and found that these violations had occurred. The Child Care Licensing Unit relied on the investigations done by the Minneapolis Police Department and County Child Protection Services in making its findings.²⁴

22. The Licensee had asked Mr. Neal to leave her home on numerous occasions but he refused.²⁵ After the Licensee was diagnosed with breast cancer during the week of the police raid, Mr. Neal told her that he did not want to leave her during her illness.²⁶

23. On October 28, 2005, the Licensee obtained an Order of Protection against Mr. Neal excluding him from her residence. The Licensee alleged in her Petition for the Order for Protection that Mr. Neal had threatened to kill her many times. She specifically alleged that he had threatened to kill her and others in the house if she made him leave.²⁷ Mr. Neal denied the allegations made by the Licensee in her Petition but agreed to the issuance of the Order for Protection.²⁸

24. The police escorted Mr. Neal out of the Licensee's house on October 31, 2005. Mr. Neal has not returned since that time, but the Licensee is concerned that he will violate the Order for Protection. The Licensee intends to obtain a divorce from Mr. Neal as soon as she obtains a job and can afford to do so.²⁹ Mr. Neal is now living at a different address in Minneapolis.³⁰

25. No parents of children receiving care from the Licensee testified in support of the Licensee at the hearing.

²² Testimony of N. Morris; Ex. 14.

²³ Testimony of N. Morris; Ex. 15.

²⁴ Testimony of L. Meneely; Ex. 19.

²⁵ Testimony of Licensee, W. Henderson.

²⁶ Testimony of Licensee; Ex. 20.

²⁷ Testimony of L. Meneely, Licensee; Exs. 13, 20, 21.

²⁸ Ex. 21.

²⁹ Testimony of Licensee.

³⁰ Testimony of Licensee, L. Meneely; Ex. 13.

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Commissioner of Human Services and the Administrative Law Judge have jurisdiction to consider this matter.³¹

2. The Department through Hennepin County gave proper and timely notice of the hearing and has complied with all procedural requirements of law and rule.

3. The Commissioner is required by statute to act immediately to temporarily suspend a license if a “license holder’s actions or failure to comply with applicable law or rule, or the actions of other individuals or conditions in the program pose an imminent risk of harm to the health, safety, or rights of persons served by the program.”³²

4. At a hearing appealing an Order of Temporary Immediate Suspension, the burden of proof is on the Department to demonstrate that “reasonable cause exists to believe that the license holder’s actions or failure to comply with applicable law or rule poses an imminent risk of harm to the health, safety, or rights of persons served by the program.”³³ The Department may demonstrate reasonable cause by submitting statements, reports or affidavits to substantiate the allegations.³⁴ The Administrative Law Judge is to determine “whether the immediate suspension should remain in effect pending the Commissioner’s final order regarding a final licensing sanction.”³⁵

5. Minn. Stat. § 245C.03 requires that background studies be conducted on individuals age 13 and over living in the household where the licensed program will be provided.

6. Minn. Stat. § 245C.14 specifies that the Commissioner disqualify individuals who are the subject of a background study from any position allowing direct contact with persons receiving services from the license holder upon receipt of information showing “a preponderance of the evidence indicates the individual has committed an act or acts that meet the definition of any of the crimes listed in” Minn. Stat. § 245C.15, which includes offenses under Chapter 152 of the Minnesota Statutes pertaining to drugs and controlled substances. In addition, individuals are disqualified under Minn. Stat. § 245C.15, subd. 4(b)(2), if less than 7 years has passed since a determination of substantiated recurring maltreatment of a minor under Minn. Stat. § 626.556.

7. Minn. Rules 9502.0395 specifies that no child shall be subject to emotional abuse, which is defined to include “threats which . . . frighten the child.”

8. Minn. Rules 9502.0435, subp. 1, specifies that child care residences must be free from accumulations of dirt and rubbish. Subparts 4 and 6 of the same rule state that all toxic substances must be inaccessible to children and potential hazards must be kept out of the reach of infants, toddlers, and preschoolers.

³¹ Minn. Stat. §§ 245A.07, subds. 2, 2a and 3; 14.50.

³² Minn. Stat. § 245A.07, subd. 2.

³³ Minn. Stat. § 245A.07, subd. 2a(a).

³⁴ Minn. Stat. § 245A.08, subd. 3.

³⁵ Minn. Stat. § 245A.07, subd. 2a(c).

9. The Department has demonstrated that there is reasonable cause to believe that the actions of the Licensee and/or other individuals or conditions in the Licensee's day care program pose an imminent risk of harm to the health, safety, or rights of children in the Licensee's care because of the Licensee's failure to be adequately vigilant about the activities occurring in and around her home; the Licensee's failure to ensure that toxic and hazardous items such as drugs and drug paraphernalia were kept out of reach of children; the Licensee's failure to protect children in her care from drug activity; the Licensee's failure to report her husband's drug use or have him removed from the home prior to October of 2005; the Licensee's failure to report additional household members so that background checks were obtained; the Licensee's substantiated neglect of children in her care on September 28, 2005; possible unsanitary conditions in the Licensee's home on September 28, 2005; and the possibility that Mr. Neal (who has been disqualified because a preponderance of the evidence shows that he has committed the crime of fifth degree felony possession of a controlled substance) may return to the Licensee's home or continue to deal drugs out of the Licensee's home.

10. These Conclusions are reached for the reasons set forth in the attached Memorandum, which is incorporated in these conclusions.

Based upon the foregoing Conclusions, and for the reasons set forth in the attached memorandum, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS HEREBY RECOMMENDED that the Commissioner of Human services order that:

The Order of Temporary Immediate Suspension of the Licensee's family child care license be AFFIRMED and that the Protective Order entered in this matter on November 10, 2005, remain in effect.

Dated: December 1, 2005.

/s/ Barbara L. Neilson

BARBARA L. NEILSON
Administrative Law Judge

Reported: Tape-recorded; no transcript prepared.

MEMORANDUM

The Department has the burden of showing that there is reasonable cause to believe that an action by the license holder or the actions of other individuals pose an imminent risk of harm to the health, safety, or rights of persons in her care. This is a modest standard, and is intended to assure that vulnerable children are protected until there can be a full hearing and final determination.

The County, acting as agent for the Department, must present reliable oral testimony and/or documentary evidence in support of a finding of reasonable cause. If the Licensee presents little or no evidence but merely challenges the adequacy of the evidence presented by the Commissioner, the Administrative Law Judge should find reasonable cause if the facts appearing in the record would preclude the granting of a motion by the Licensee to dismiss at the close of the evidence presented.

There is an adequate showing of reasonable cause unless the Administrative Law Judge is satisfied that the evidence offered by the Licensee makes inherently incredible facts which appear in the record and which are necessary to establish an essential element of the licensing violation. It is similar to the probable cause showing that must be made in a criminal proceeding.³⁶

In this case, the Department presented credible evidence through the police reports that the Minneapolis Police Department determined in several surveillances and in a drug raid in late September 2005 that drugs were being sold from the Licensee's residence with the assistance of the Licensee's husband. A search warrant was executed and drugs and drug paraphernalia were found in the home and in the possession of the Licensee's husband. The Licensee was caring for four grandchildren in the upstairs unit at the time of the forced entry by the police on the night of the raid. Cocaine, marijuana, and drug paraphernalia were potentially accessible to the children in her care that evening. Based on County records, it appears that the Licensee had been authorized to receive child care assistance for the younger three grandchildren who were sleeping in the upper unit on September 28.³⁷ Even if the Licensee was not the authorized day care provider for those children, she was responsible for them and they were exposed to the risks associated with the sale and use of drugs in and around her home.

Although the parties disputed whether the Licensee in fact knew of her husband's relapse into drug use or the drug activity occurring in and around her home after she went to bed at night, there was credible evidence that the Licensee did know that "Blue" was a drug dealer who was spending time with her husband and in her home, she made statements to police officers suggesting that she knew of her husband's drug use, and she had discussed her husband's drug use with his uncle. Despite this, she did not seek assistance, report her husband's drug use to authorities, or have him removed from the home prior to October 2005. Moreover, the Licensee testified that she often gets up at night, which makes it more likely that she should have known of the illegal drug activity occurring in and near her home. And she also admitted that her husband

³⁶ See, e.g., *State v. Florence*, 306 Minn. 442, 239 N.W.2d 892, 897, 903-04 (1976).

³⁷ Testimony of Meneely; Exs. 5, 18.

was “out in the street” frequently, she wondered what he was doing, and she thought he might be using again. At a minimum, there is evidence that the Licensee was not adequately vigilant in monitoring the conduct of her husband, being aware of activities in her residence, and protecting the children in her care. Although, to her credit, the Licensee has now obtained an Order for Protection excluding her husband from her residence, she has not commenced divorce proceedings and there is no guarantee that he will not return to the home. This, in combination with the disqualifications of the Licensee for substantiated neglect and of Mr. Neal based on a preponderance of the evidence demonstrating his commission of fifth degree felony possession of a controlled substance; the Licensee’s admitted failure to report two adults that lived in her household for three months; and evidence that the police found unsanitary conditions in the Licensee’s home on September 28, 2005, despite the Licensee’s denial that such conditions existed, demonstrates reasonable cause to believe that the conduct of Licensee and/or her husband or the conditions in her home place children in Licensee’s care in imminent risk of harm.

According, the Administrative Law Judge finds that the Commissioner has the authority to take immediate action to protect the children in Licensee’s care by suspending the license until a full hearing is conducted.

B.L.N.